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SUCCESSIONS AND DONATIONS

H. Alston Johnson*

LEGISLATION

The work of the 1983 regular legislative session in the field of successions and donations was of a relatively minor nature. Yet another amendment to Civil Code article 1505 clarified the assets which are subject to the calculation of the active mass for forced heirship purposes by specifying that both the "employer and employee contributions" to plans of deferred compensation adopted by public employers or private plans qualified under the Internal Revenue Code are exempt from the calculation.¹ A previous amendment had made only the benefits payable under such plans exempt.²

Act 198 of the 1983 session authorizes persons who are deaf to be witnesses to an ordinary statutory testament under Louisiana Revised Statutes 9:2442 or a braille statutory testament under Louisiana Revised Statutes 9:2444. Since there is no public reading of the testament under these forms, no particular problem is caused by the fact that a witness could not hear. It suffices if he can read the attestation clause and understand the indication that this is the testator's last will. A deaf person could not be a witness to the form of a statutory testament reserved for illiterate persons or those whose sight is so impaired that they are unable to read,³ since a public reading of such a testament in the presence of the witnesses is the assurance that it represents accurately the wishes of the testator. The amendment does not change the basic qualifications for witnesses in any other way, so there is no authority for a deaf person to be a witness to any testament other than the two specifically mentioned in the amendment.⁴

Act 566 of 1983 amends Civil Code articles 1621 and 1622 to add an additional ground of disinheritance: conviction of a felony for which the law provides that the punishment could be life imprisonment or death. This addition is clear enough, but the companion amendment to article 1622 is troublesome. Formerly, article 1622 provided that ascendants (grandparents, for example) could disinherit their descendants "coming to their succession" (grandchildren, after the premature death of their own parent) for the first nine causes listed "when the acts of ingratitude

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1. LA. CIV. CODE art. 1505(D), *as amended by* 1983 La. Acts, No. 656, § 1.

2. 1981 La. Acts, No. 909, § 1.

3. LA. R.S. 9:2443 (Supp. 1983).

4. *See* LA. CIV. CODE art. 1591.

5. The tenth cause (marriage of the minor child without the parent's consent) was simply omitted from those causes for which a grandparent or other ascendant might disinherit a grandchild.

there mentioned have been committed towards them, instead of towards their parents." The amendment in Act 566 of 1983 provides simply that ascendants may disinherit their descendants for the first nine causes and the new cause "when the acts there mentioned have been committed." This amendment omits any reference to the requirement that the conduct have been directed "towards" the grandparents. Suppose child *A* struck his parent *B* during *B*'s lifetime and could have been disinherited for that reason by *B*.⁶ Further, suppose that *B* predeceases his own parent *C*, but does not disinherit *A*. When *C* finally dies, with *A* as a forced heir because of the premature death of *B*, the new language of article 1622 seems to indicate that *C* can disinherit *A* even though the conduct was not directed at *C* and the person at whom it was directed declined to disinherit *A*. The language can be so interpreted, though it is doubtful that such an interpretation was intended.

Three other acts of this session made relatively minor changes in the trust code and the state gift tax provisions.⁷

JUDICIAL DECISIONS

Rights of Illegitimates

Perhaps the most intriguing aspect of the recent decision in *Succession of Brown*,⁸ which held that illegitimate and legitimate descendants could not constitutionally be given differing treatments as to intestate succession rights, was whether its rationale would be applied retroactively. At the time of the writing of last year's symposium article, there was no answer to this interesting question. An answer is now available, and it appears to be a most sensible answer which will resolve most, if not all, of the lingering doubts about the reach of the *Brown* decision.

6. See *Succession of Chaney*, 413 So. 2d 936 (La. App. 1st Cir. 1982) (successful disinheriton on ground that child had struck the parent) and the discussion in Johnson, *Developments in the Law, 1981-1982—Successions and Donations*, 43 LA. L. REV. 585, 605-06 (1982).

7. Act 201 of 1983 adds LA. R.S. 47:1205(C) to provide that gifts made by either spouse to third persons may be considered as being made one half by each spouse for gift tax purposes, so long as both spouses are "citizens or residents" of Louisiana and have consented in the manner provided in the act. Act 79 of 1983 amends LA. R.S. 9:1988 and LA. R.S. 9:1990 to permit refusal of a part of an interest in trust, and to provide for its effect. Prior law would not permit such a partial refusal. Act 622 of 1983 amends LA. R.S. 9:2241 to provide that when the trust instrument does not designate an attorney for the trust or if the attorney is incapable of acting or resigns, and the trustee is a natural person, the trustee shall select an attorney rather than the beneficiaries. While this provision is clear on the surface, the choice of language may not cover all situations. If there are two trustees and only one of them is a "natural person," who has the choice of selecting the attorney under those circumstances? The statute only envisions a situation in which "the trustee" is a natural person.

8. 388 So. 2d 1151 (La. 1980), *cert. denied*, 450 U.S. 998 (1981).

During this past term, *Succession of Clivens*⁹ and *Harlaux v. Harlaux*¹⁰ were finally decided, and each case revealed a piece of the puzzle. *Clivens* was discussed briefly in last year's symposium, but the case was awaiting rehearing at that time. Its facts may be summarized briefly. The decedent died in 1971, and his widow was sent into possession three years later. When she died in 1978, her collateral relations sought possession of her estate, including property inherited from her husband. A person claiming to be the acknowledged illegitimate daughter of the deceased husband intervened in the widow's succession proceedings. If *Brown* were applicable to a death in 1971, the intervenor would have been entitled to the decedent's property rather than his widow.

The trial court sustained an exception of no cause of action as to the intervention, and the court of appeal affirmed.¹¹ On original hearing, the supreme court opted for a prospective application of *Brown* as to third parties and as to testate successions, but with a "limited retroactive exception" as to co-heirs in an intestate succession.¹² In dissent, Justice Dennis argued for application as of the effective date of the 1974 state constitution: midnight on December 31, 1974.¹³

On rehearing, the supreme court reached the result advocated by the Dennis dissent, though not for the reasons he had espoused.¹⁴ The court thus applied *Brown* "retroactively" to both testate and intestate successions, "to January 1, 1975, the effective date of the Louisiana Constitution of 1974."¹⁵ Using an analysis (which is not especially pertinent to this discussion) based upon *Lovell v. Lovell*¹⁶ and *Chevron Oil Co. v. Huson*,¹⁷ the court felt that the considerations pointing toward non-retroactivity were insufficient to limit the decision to prospective application only. But the court's choice of the effective date of the 1974 constitution as the limitation on retroactivity, of course, meant that the in-

9. 426 So. 2d 585 (La. 1983).

10. 426 So. 2d (La.), *cert. denied*, 104 S. Ct. 74 (1983).

11. *Succession of Clivens*, 406 So. 2d 790 (La. App. 4th Cir. 1981).

12. Justice Watson who wrote the majority opinion on original hearing noted in the very first footnote to the opinion that he had dissented in the *Brown* decision. 426 So. 2d at 586 n.1.

13. LA. CONST. art. XIV, § 35; 426 So. 2d at 590-93 (Dennis, J., dissenting).

14. The court took no note of Justice Dennis' argument that article XIV, section 18(B) of the 1974 constitution rendered Civil Code article 919 ineffective as of the effective date of the constitution—a position which would have eliminated any need to discuss "retroactivity" at all. Article XIV, section 18(B) provides: "Laws which are in conflict with this constitution shall cease upon its effective date."

15. Unfortunately, the effective date is not that precise. Article XIV, section 35 of the 1974 constitution provides that the constitution "shall become effective at twelve o'clock midnight on December 31, 1974." Does this language refer to the middle of the night of December 30/31, 1974, or the middle of the night of December 31, 1974/January 1, 1975?

16. 378 So. 2d 418 (La. 1979).

17. 404 U.S. 97 (1971).

tervenor's claim based upon a death in 1971 did not present a cause of action, and thus the decision below was affirmed.

Although the decision has subsequently been interpreted as establishing a definite date of applicability which will settle all questions, the decision may not be that clear. There were three dissents and a concurrence, so only three justices actually joined in the opinion. One dissenter was the drafter of the original opinion.¹⁸ Another opined that the decision should be retroactive "without any limitation applicable in this case."¹⁹ The third dissented without reasons.²⁰ The concurring justice thought there should be no retroactivity to the *Brown* decision at all.²¹ Thus it seems fair to say that one justice failed to join the plurality opinion because he thought it did not go far enough and another because he thought it went too far. What might have been the case if the decedent had died in 1976 is therefore only speculative. Presumably, those three justices who joined the plurality opinion not to go back to 1971 because the effective date should be January 1, 1975, would vote to extend *Brown* to a death in 1976, and these three justices would be joined by the dissenter who apparently would have gone back beyond 1971. But this conclusion is not assured since some of those who voted not to go back to 1971 might have thought that the *Brown* decision should not be retroactive at all but might have failed to specially concur. If such is the case, there might not be four votes for January 1, 1975, as an effective date. *Clivens* may simply mean that four justices voted not to go back to 1971, which is not quite the same thing.

For what it may be worth, in the opinion in *Harlaux* rendered the same day as the opinion on rehearing in *Clivens*, the court characterized the *Clivens* opinion as holding that *Brown* "would have a limited retroactive application back to January 1, 1975."²² Only two justices dissented, and the same concurrence expressed no retroactivity as a preferable rule. The death in *Harlaux* occurred in 1938.

The *Harlaux* opinion answered another question. Regardless of the date that might have been chosen in *Clivens*, an exception might arguably be made when the property is still "within the family," *i.e.*, when no third persons would be affected by redistributing the property to include

18. 426 So. 2d at 601 (Watson, J., dissenting). Justice Watson presumably prefers his position of total retroactivity as to intestate succession and no retroactivity as to testate succession and third persons.

19. *Id.* (Lemmon, J., dissenting). Whether this language means complete retroactivity in every case, or whether there might be some cases in which a limitation might be applicable is unclear.

20. *Id.* (Dixon, C.J., dissenting). Chief Justice Dixon also dissented without reasons in *Harlaux v. Harlaux*, 426 So. 2d 602 (La. 1983), *cert. denied*, ____ S. Ct. ____ (1983).

21. *Clivens*, 426 So. 2d at 601 (Marcus, J., concurring).

22. *Harlaux*, 426 So. 2d at 603.

the claims of illegitimate descendants. The decedent in *Harlaux* died with neither legitimate ascendants nor descendants, and his legitimate sister was sent into possession of the property. The sister later donated a portion of the property to an alleged illegitimate son of the decedent, and she subsequently bequeathed the balance to him in her testament. Thus, at the time of suit contesting the foregoing process, the illegitimate son had title to the entirety of the property. The rival claimants were the descendants of an alleged illegitimate daughter of the decedent. The court took no particular note of the "intra-family" status of the property and refused to extend *Brown* to a death in 1938. Thus the interesting issue of whether descendants of an alleged illegitimate child could bring such an action was pretermitted.

Decisions subsequent to *Clivens* and *Harlaux* have read the opinions as establishing January 1, 1975 as the firm cut-off date for application of the *Brown* decision.²³ Thus *Brown* gives no rights to claimants to the property of those who died before that date, but it may accord rights to those who died after that date.

Even the limited retroactivity chosen in *Clivens* will cause some headaches for title examiners. However, a three-pronged attack on the problem will eliminate most of the difficulties, once the "grace period" cases are out of the system.²⁴ The first inquiry obviously must concern the date of death of the decedent. For deaths prior to January 1, 1975, no substantive rights exist in the various claimants, and further inquiries are unnecessary.

If the death is subsequent to January 1, 1975, *Clivens* and *Brown* will grant substantive rights to those who are properly filiated to the decedent. The attention of the title examiner must turn now to the filiation statute. *For those who must bring an action of filiation*, a rather stringent time limitation exists: the action must be commenced within nineteen years of birth or one year from the death of the alleged parent, whichever first occurs.²⁵ Thus, even if the death occurred after January 1, 1975, the time period for a filiation action may have expired and would thus bar the

23. Succession of Hawkins, 429 So. 2d 194 (La. App. 1st Cir. 1983) (death in 1980; filiation action filed within grace period); Succession of Levy, 428 So. 2d 904 (La. App. 1st Cir. 1983) (death in 1977); Succession of Payne v. Payne, 426 So. 2d 1355 (La. App. 3rd Cir. 1983) (death in November, 1975). *But see* IMC Exploration Co. v. Henderson, 419 So. 2d 490 (La. App. 2d Cir.), *cert. denied*, 423 So. 2d 1150 (La. 1982) (appellate court gave unlimited retroactive application to *Brown* in intestate succession matter, based on original opinion in *Clivens* and prior to the issuance of the opinion on rehearing). Six weeks prior to the issuance of the opinion on rehearing in *Clivens*, the court denied writ requests in *Henderson*.

24. For an extended and excellent discussion of the "grace period" problems, see Spaht, *Developments in the Law, 1980-1981—Persons*, 42 LA. L. REV. 403 (1982); Spaht, *Developments in the Law, 1979-1980—Persons*, 41 LA. L. REV. 372, 380 (1981).

25. LA. CIV. CODE arts. 208-209.

claims of some potential adversaries. But the filiation statute only bars those who must bring the action and do not do so timely. Those who are presumed to be the children of the deceased (the children of the woman to whom a man is married, for example) do not have to bring the action, and they are not barred by this time limitation. Also, those who have been formally acknowledged do not have to bring the action and are not barred by the time limitation. Thus, if a man acknowledged a child by notarial act recorded in East Carroll Parish in 1946, and died in 1974 possessed of property in Lafourche Parish, the claim of that child asserted in 1983 is not barred by the time limitation of the filiation statute.

At this point, the title examiner must look to a third source for help. The provisions of Louisiana Revised Statutes 9:5630 state that a transfer of immovable property to a third person by onerous title or the acquisition of an interest in immovable property by onerous title is protected from attack by unrecognized successors by a time period of two years from the judgment of possession.²⁶ This enactment makes no distinction between the types of unrecognized successors and would therefore bar the claim of the formally acknowledged child described above. Thus, the title examiner can at least say that when two years have passed from the judgment of possession, acquisition of an interest or of ownership by onerous title will not be subject to divestiture at the instance of an unrecognized successor.

This third inquiry does not eliminate all of the problems, of course, since it has no application to persons who acquire by gratuitous title or those who are not genuine third persons. Conspicuously excluded from the definition of third persons are co-heirs. It is therefore completely plausible that if the co-heirs of our formally acknowledged illegitimate were sent into possession in 1979, and are still in possession in 1983, their rights could be divested and the property redivided at the instance of the illegitimate child under provisions such as those of Civil Code article 1381.²⁷

26. LA. R.S. 9:5630 provides:

A. An action by a person who is a successor of a deceased person, and who has not been recognized as such in the judgment of possession rendered by a court of competent jurisdiction, to assert an interest in an immovable formerly owned by the deceased, against a third person who has acquired an interest in the immovable by onerous title from a person recognized as an heir or legatee of the deceased in the judgment of possession, or his successors, is prescribed in two years from the date of the finality of the judgment of possession.

C. "Third person" means a person other than one recognized as an heir or legatee of the deceased in the judgment of possession.

27. Civil Code article 1381 provides:

If, after the partition an heir appears, whose death has been presumed on account of his long absence, or whose right was not known, as if a second testament unknown, until then, should entitle him to inherit with the others, the first partition must be annulled, and another must be made of all the property re-

The supreme court has given a sensible answer to the main portions of the retroactivity question, and wisely has chosen to answer only the questions presented to it. But the fact that the answer will not resolve a few nagging questions which will no doubt form the basis of future discussions in this forum should not be overlooked.

Prohibited Substitutions

Discussions of the various decisions in *Succession of Goode*²⁸ have occupied space in this forum for the past two years. Two years ago, Professor Gerald Le Van discussed the decision of the Louisiana Second Circuit Court of Appeal.²⁹ Last year, this writer discussed the decision of the supreme court on original hearing, while noting that a rehearing had been granted.³⁰ The opinion on rehearing has now been rendered, changing the rationale but not the result of the original opinion.

The decedent in *Goode* died testate without ascendants or descendants, survived only by a half brother and the descendants of a predeceased half sister. His olographic testament contained several specific dispositions but no residuary legacy. The disputed paragraph read:

Fifth: All oil & gas royalty interest payments owned by me shall be paid to Pauline Egbert Parker for as long as she might live. After her death, the amount of any payments shall be equally divided between my nieces and nephews and Linda Cosby Paine.³¹

Opponents of the will sought a declaration of its nullity in the entirety or at least the nullity of the disposition quoted above as containing a prohibited substitution—a disposition first to Pauline Egbert Parker and then to the nieces, nephews and Linda Cosby Paine. The appellate court had held that the disposition was a prohibited substitution,³² but properly held that only the disposition and not the entire testament was invalid.³³

maintaining in kind, and of the value of whatever has been consumed or alienated, in order that he may have the share of the whole to which he is entitled.

There is no apparent time limit to such a claim. The co-heirs who hold under the judgment of possession cannot assert a ten-year acquisitive prescription against such a claim, since a judgment of possession is not translatif of ownership. *Everett v. Clayton*, 211 La. 211, 29 So. 2d 769 (1947); *Tyler v. Lewis*, 143 La. 229, 78 So. 477 (1918). It would be difficult to achieve acquisitive prescription under the thirty-year provisions, and therefore the thirty-year liberative prescription of Civil Code article 1030 available to accepting co-heirs, running from the death of the decedent, appears to be the only applicable prescriptive period.

28. 425 So. 2d 673 (La. 1983).

29. Le Van, *Developments in the Law, 1980-1981—Trusts and Estates*, 42 LA. L. REV. 454, 462 (1982).

30. Johnson, *Developments in the Law, 1981-1982—Successions and Donations*, 43 LA. L. REV. 585, 593-94 (1982).

31. 425 So. 2d at 679-80.

32. *Succession of Goode*, 395 So. 2d 875, 878 (La. App. 2d Cir. 1981).

33. See *Succession of Walters*, 261 La. 59, 259 So. 2d 12 (1972).

The supreme court was seriously split in the original opinion. Justice Lemmon garnered three votes for his view that the legacy was of a usufruct to Pauline Parker and an equal division of naked ownership to the other legatees. Since Civil Code article 1522³⁴ authorizes such a legacy, the original opinion reversed the appellate court's invalidation of the disposition.

Chief Justice Dixon dissented from the original opinion on the ground that the legacy was of successive usufructs, and no disposition of the naked ownership had been made in the testament. His view became the majority view upon rehearing. He emphasized the use of the word "payments" as opposed to "royalty interest" in the dispositive language, reasoning that the testator meant to convey the equivalent of a usufruct rather than ownership of the underlying asset producing the civil fruits (revenues from mineral production). Finding the same language in the disposition to the second group of legatees, he concluded that successive usufructs were intended and permissible. But finding no disposition of the ownership of the underlying asset (the royalty interest itself), he concluded that it fell intestate. Two justices still dissented, believing that the disposition was a prohibited substitution and thus null.

The reasoning in the opinion on rehearing seems sound and commendably seeks to give validity to the testator's expressed intent.³⁵ Although the court did not take particular note of it, the fact that the testament was olographic would also support a lenient interpretation of its contents.³⁶ Indubitably, the provisions could have been better drafted. Practitioners might pay particular attention to avoiding phrases such as "after her death" and the use of a future-tense verb (e.g., "shall be divided"), especially when ownership is dismembered in some way. Arguments of future rather than present vesting could be founded upon such phrases. The phrases in *Goode* caused no difficulty since successive usufructs are authorized by the Civil Code. But had the testator written something like "royalties to X, and after her death the royalties shall go to Y," the case might have been much more difficult. If successive usufructs are intended, the drafter would be well advised to say so explicitly.

Form of Testaments

As in every term, the form of testaments was a popular topic of litiga-

34. Civil Code article 1522 states: "The same [validity] shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked ownership to another."

35. "A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none." LA. CIV. CODE art. 1713.

36. See *Carter v. Succession of Carter*, 332 So. 2d 439 (La. 1976), and authorities cited therein.

tion this term. But unlike some previous terms, a refreshing breeze of leniency wafted through the pages of the appellate decisions. Three noteworthy decisions involved statutory testaments. In *Estate of Wartelle*,³⁷ the third circuit held that the signature of a third (and therefore surplus) witness to such a testament, who was made a legatee in the testament, could be disregarded as unnecessary. The two other witnesses who signed (and were not made legatees) were competent, and since the statute only calls for two witnesses, the court properly ignored the signature of the third witness as unnecessary to fulfill the statutory requisites. This disposition permitted the court to avoid the problem faced in *Evans v. Evans*,³⁸ and the harsh result of invalidating an entire testament because one of the necessary witnesses was made a legatee in one provision.

The decision in *Succession of Byrd*³⁹ involves the seemingly endless problem of the "double signature" in a statutory testament. This matter was discussed in some detail in last year's symposium.⁴⁰ The issue is simply whether a statutory testament is invalid if the testator fails to sign *both* at the end of the dispositive provisions of the will and again at the end of the attestation clause, or fails to sign at least at the end of the attestation clause alone. The present controversy involved the testaments of a husband and wife. Each testament was drafted in the same form. The testator and testatrix signed the respective wills at the end of the dispositive provisions, but not after the attestation clause. Only the attestation clause was dated. Opponents of the testaments argued that both a date and a written acknowledgment of the process of confection were required to be *above* the signature of the testator or testatrix and that these testaments were thus invalid for want of proper form.

The second circuit correctly held that the statute does not contain such a requirement, and that the wills were valid. This decision respects the proper distinction between the dispositive provisions and the attestation clause. Only the former really concerns the testator; his signature beneath those provisions permits the inference of his approval of them. The latter concerns only the notary and witnesses, who are asserting that the proper process of confection took place on the day indicated, thus satisfying the statutory requirement that the act be dated. Perhaps another revision of the language authorizing this type of testament will one day make it clear that a "double signature" is not an essential requirement of validity for this form of testament.

Finally, in *Succession of Dilley*,⁴¹ the fifth circuit was faced with a

37. 428 So. 2d 1300 (La. App. 3d Cir.), writ denied.

38. 410 So. 2d 729 (La. 1982). See Johnson, *supra* note 30, at 601-03.

39. 419 So. 2d 100 (La. App. 2d Cir.), cert. denied, 422 So. 2d 155 (La. 1982).

40. See Johnson, *supra* note 30, at 595-96.

41. 422 So. 2d 516 (La. App. 5th Cir. 1982).

somewhat more difficult problem. Instead of tracking the statutory language for the attestation clause,⁴² the drafter of the testament in question chose to do some legal pioneering:

Signed on both pages and declared by Donald E. Dilley, testator above named, in our presence and in the presence of each other, to be his last will and testament, we have hereunto subscribed our names as witnesses, on the day and date first above written, in the Parish of Jefferson, State of Louisiana.⁴³

Predictably, this attestation clause came under attack on the ground that it did not recite that the notary and witnesses signed the will in the presence of the testator and of each other. If carefully read, the clause only asserts that the testator signed in their presence, and that they signed the will on a given date. The opponents of the testament argued that the notary and witnesses could easily have signed the testament at a later time on the same day and in another location.

The contested clause does deviate from the statutory language, which states that the notary and witnesses have signed the document "in the presence of the testator and each other." But the statute also says that the clause shall be as provided in the statute, or in language "substantially similar" to the statutory provisions. Fortunately, the court held that the actual provisions were sufficiently similar to the statutory ones so that the testament could be upheld. Even this favorable result provides a message: there is simply nothing to be gained by using an attestation clause different from that suggested in the statute, and a lawyer or notary who fails to track the statutory language is simply asking for trouble with no demonstrable justification for doing so.

During this term there was even a refreshing gesture of leniency toward the most rigid of all testaments, the nuncupative testament by public act. In *Succession of Orlando*,⁴⁴ all of the difficult requisites for validity of such a testament were "assiduously complied with"⁴⁵ by the notary. However, in the laborious process of dictation, transcription, and reading back of the contents of the testament, the testator apparently requested a witness to translate a word or phrase from English into Italian to be certain that he had expressed himself accurately and that the testament reflected his wishes. There seemed to be no dispute that the testator spoke

42. LA. R.S. 9:2442(B)(2) suggests the following language:

The testator has signed this will at the end and on each other separate page, and has declared or signified in our presence that it is his last will and testament, and in the presence of the testator and each other we have hereunto subscribed our names this _____ day of _____, 19____.

43. 422 So. 2d at 517.

44. 419 So. 2d 559 (La. App. 4th Cir. 1982).

45. *Id.* at 561.

and understood English, but he was unable to read or write the English language. The notary and witnesses spoke and understood English. The opponents of the testament argued that the testator did not "understand" the language in which the will was written, and read back to him, and thus the testament should be invalid. The fourth circuit agreed with the trial court that the translation of a word or two for the sake of accuracy did not demonstrate that the testator did not "understand" English.

The opinion is not precise as to the point at which the translation may have taken place. Perhaps the testator spoke almost wholly in English, but came to a point at which he may have asked for assistance in rendering an Italian word or phrase into the English in which he was dictating. That request alone would not alter the fact that his dictation was wholly in the English language and should have posed little difficulty in upholding the testament.

The situation is somewhat more troublesome if he had to halt the reading-back process to inquire about the meaning of an English word or phrase. Such a situation would more clearly indicate that he did not understand what he himself had dictated. In that event, there is more cause for concern since part of the process of assuring that the testament reflects the wishes of the testator is his ability to compare what he said with what the notary has written and is now reading back to him. However, the mere fact that he made an occasional inquiry is not sufficient to show lack of "understanding," and that burden was on the opponents. In light of prior decisions upholding testaments when the notary had "refined" the language of the testator after its dictation but without changing the meaning,⁴⁶ the court's validation of the testament in *Orlando* is certainly acceptable.

Testamentary Capacity

The clear winner in the contest for "least likely to succeed" among the attacks on testaments is one suggesting that the testator lacked the mental capacity to dispose of his property under Civil Code article 1475. Early cases indicate in dicta that an interdicted person is not conclusively presumed to lack mental capacity to write a testament,⁴⁷ despite the Civil

46. Successions of Gilbert, 222 La. 840, 64 So. 2d 192 (1953); *Rostrup v. Succession of Spicer*, 183 La. 1087, 165 So. 307 (1936), and authorities cited therein; *Hennessey's Heirs v. Woulfe*, 49 La. Ann. 1376, 22 So. 394 (1897); *Hamilton v. Hamilton*, 6 Mart. (n.s.) 143 (La. 1827).

47. See, e.g., *Livaudais v. Bynum*, 165 La. 890, 891, 116 So. 223, 224 (1928) (deceased was committed to an asylum but never formally interdicted; court upheld the testament during his commitment, saying in dicta: "We are not prepared to hold that even a *formal interdiction* deprives the person interdicted ipso facto of all power to make, alter, or revoke a will, even during a lucid interval." The remainder of that paragraph indicates that the

Code articles which might suggest precisely the contrary.⁴⁸ These cases could be summarized as purporting to establish that the existence of a judgment of interdiction does not equate to testamentary incapacity. Understandably, other cases indicate that the absence of such a judgment does not conclusively establish sanity.⁴⁹

Among the more recent decisions, *Succession of Lanata*⁵⁰ is often cited for the proposition that interdiction does not conclusively establish insanity. But the case can hardly be authority for that proposition, since the judgment in that case does not recite mental reasons for the interdiction. Be that as it may, appellate courts blithely continue to cite *Lanata* and the earlier dicta for the unusual principle that a judicial declaration of interdiction on the basis of insanity does not mean that a person is actually insane. Absent the strong policy favoring testacy that is reflected in that principle, such an announcement would be ludicrous on its face. As it is, the principle is of dubious value. Why go to the trouble of a judicial declaration of mental incapacity and subsequently discard it when the time comes for the very serious act of disposing of one's property in perpetuity (unless the testament is later revoked)? To say that a judicially interdicted person cannot sign a simple contract on a given day but could, on that same day, write a testament makes very little sense. As indicated, the only possible justification is a strong interest in testation.

The present term contains another example of this principle. In *Succession of Catanzaro*,⁵¹ the validity of a testament confected after a judgment of interdiction (apparently for mental reasons) was at issue. The testament was the third written by the testatrix; one of them had been written before the judgment of interdiction. The opponents of the testament argued that the third testament was invalid because of a lack of mental capacity, shown primarily, if not conclusively, by the interdiction. The fourth circuit rejected the argument, citing *Succession of Lanata*.

To add insult to injury, an opponent claiming that a testator lacks mental capacity also often finds himself facing a difficult standard of proof in overcoming the presumption of sanity. Finding authority in a dubious paragraph in an early case,⁵² some courts require the opponent to prove

court may simply have meant to point out that interdictions are also made for physical reasons.).

48. See LA. CIV. CODE art. 1788(10), (11), (13).

49. See, e.g., *Marie v. Avart's Heirs*, 10 Mart. (o.s.) 25 (La. 1821) (were it otherwise, unscrupulous persons might delay interdiction proceedings knowing that sanity was conclusively presumed by the absence of a judgment of interdiction).

50. 205 La. 915, 18 So. 2d 500 (1944).

51. 417 So. 2d 863 (La. App. 4th Cir. 1982).

52. In *Succession of Mithoff*, 168 La. 624, 627, 122 So. 886, 886-87 (1929) the court wrote:

Testamentary capacity is always presumed. In other words, every person is con-

insanity "beyond a reasonable doubt."⁵³ The better-reasoned cases require a lesser, but still substantial, standard of "cogent, satisfactory and convincing evidence."⁵⁴ Even that slightly more lenient standard is more than most opponents can achieve.

An interesting case during this term focuses on the issue from a different perspective. But the language of proof "beyond a reasonable doubt" still found a place in the court's opinion. In *Succession of Kilpatrick*,⁵⁵ the testator had engaged in extensive estate planning over a period of years culminating in a rather complex testament which named a bank as executor and set up a testamentary educational foundation trust, with the same bank as trustee. The testament also gave certain items to his spouse and a legacy of ten percent to designated churches in the area. His wife wrote a similar testament at the same time. Shortly thereafter, the testator contracted what he thought to be a minor illness. It turned out to be much more serious—terminal lung cancer. While he was hospitalized for his last days, he wrote a second testament in private nuncupative form. This testament revoked the first testament, left everything to his wife and appointed his brother and brother-in-law as executors of his estate. On the same day, his wife wrote a second testament revoking the first she had written in a fashion similar to her husband's first testament. This second testament left one half of her estate to her heirs and one half to her husband's heirs.

Within three months of the probate of the second testament after the husband's death,⁵⁶ the bank and other prospective beneficiaries of the

sidered under the law to be of sound mind, and this presumption continues until destroyed by cogent, satisfactory, and convincing evidence. The degree of proof required to overcome the presumption of sanity and of mental disposing capacity may be likened to that required in criminal cases to rebut and overcome the presumption of innocence which the law creates in favor of a person on trial for a crime.

53. See *Succession of Dixon*, 269 So. 2d 323 (La. App. 2d Cir. 1972) (calls the standard "not unlike" beyond a reasonable doubt).

54. See *Succession of Catanzaro*, 417 So. 2d 863, 864 (La. App. 4th Cir. 1982); *Succession of Bush*, 292 So. 2d 915 (La. App. 1st Cir.), *cert. denied*, 294 So. 2d 837 (La. 1974).

55. 422 So. 2d 464 (La. App. 2d Cir. 1982), *cert. denied*, 429 So. 2d 126 (La. 1983).

56. Despite the argument that might be made from article 2932 of the Louisiana Code of Civil Procedure that the burden of proving sanity might be on the proponents of the testament when the attack is made within three months of probate, the burden of proving insanity always rests with the opponents. Article 2932 reads:

The plaintiff in an action to annul a probated testament has the burden of proving the invalidity thereof, unless the action was instituted within three months of the date the testament was probated. In the latter event, the defendants have the burden of proving the authenticity of the testament, and its compliance with all of the formal requirements of the law.

On the burden remaining with the opponents on the mental capacity issue, see *Succession of Adler*, 334 So. 2d 799 (La. App. 4th Cir. 1976) (attack within three months, but opponents still had burden of proof on mental capacity and failed to discharge it).

educational trust sought a declaration of nullity of the second testament on the ground that the testator lacked mental capacity to write it. The testator had not been interdicted, so the precise issue discussed above was not presented. The primary argument of the opponents was that the rejection of the complex document, replete with careful estate planning, and its replacement by a deathbed act were evidence that the testator lacked proper mental capacity. The second circuit reviewed the voluminous evidence adduced on that point and concluded that the trial judge was not "clearly wrong" to determine that the opponents had failed to discharge the difficult standard of proof with which they were faced.

The evidence also showed that the testator was so weak that he simply made a mark on the testament rather than actually signing it, but the appellate court was equally unable to find clear error in the trial judge's conclusion that the requisites for a private nuncupative testament were fulfilled.

The argument made by the opponents was forceful and might have done justice in the particular case at hand. The opinion leaves serious question about the mental state of the decedent just prior to his death. But the precedent which might have been set had the court accepted the argument is also disturbing. Inferences other than the existence of an unsound mind may be drawn from the jettisoning of a carefully drawn, complex testament and its replacement with a last-minute will. Even the carefully drawn testament is completely revocable until the death of the testator. And though revocation in a particular instance may be thought to be unwise, lack of wisdom does not equate to insanity.

The *Kilpatrick* decision does point out, however, the unsatisfactory nature of the jurisprudence surrounding attacks on testaments on the basis of lack of mental capacity. A legislative statement would probably be of little assistance, so the judiciary must be much more careful in assessing the standard of proof required in such cases and in re-evaluating some of the supposed holdings which continue to be cited.

A final decision during this term concerning testamentary capacity deserves mention. *Succession of Comeaux*⁵⁷ is another in a short and disturbing line of cases extending the already-dubious principle of proof "beyond a reasonable doubt" when mental incapacity is alleged to cases in which the ability to read⁵⁸ is attacked. The testator executed a statutory

57. 428 So. 2d 1081 (La. App. 1st Cir. 1983).

58. The word "literacy" might be used rather than "the ability to read." *Webster's New Collegiate Dictionary* lists "able to read and write" as one of the meanings of "literate." WEBSTER'S NEW COLLEGIATE DICTIONARY 565 (1979). However, LA. R.S. 9:2442 says only that a person must know how to read. To the extent that there may be a subtle difference between a person being able to read and that person being "literate," the phrase used in the statute will be used in this section.

testament bequeathing one half of his property to his two children and the other half to his second wife. Within three months of probate of the testament, the children attacked the testament on the ground that their father could not read. The trial court imposed upon the children the burden of proving their father's inability to read, and held them to the standard of proving it "beyond a reasonable doubt." Still, they discharged the burden, and the second wife appealed from a declaration of invalidity of the testament.

The first circuit took no note of the potential argument that since the attack on the probated testament was timely, the second wife should have had the burden of proving "the authenticity of the testament, and its compliance with all of the formal requirements of the law."⁵⁹ In light of *Comeaux* and the earlier cases discussed, this burden is apparently very light. It does not impose the burden of proving either sanity or ability to read on the proponent of the testament, even upon a timely attack.

Moreover, the court imposed the rigorous standard of proof of "beyond a reasonable doubt" upon the opponents. Only two cases were cited in support of that proposition, and both were instances of attacks based on mental incapacity.⁶⁰ These cases in turn rely upon other cases involving alleged problems of mental capacity.⁶¹ The court could have cited other decisions specifically involving inability to read and the standard of proof, but those opinions do little more than track the language of earlier cases involving mental incapacity.⁶²

Thus the judiciary has apparently incorporated the inability-to-read cases into the mental incapacity cases and the concomitant standard of proof without analyzing whether the two problems deserve similar treatment. Even in modern society, one cannot confidently assert that almost

59. See LA. CODE CIV. P. art. 2932; *supra* note 56.

60. Succession of Hoover, 385 So. 2d 351 (La. App. 1st Cir. 1980); Succession of Bush, 292 So. 2d 915 (La. App. 1st Cir.), *cert. denied*, 294 So. 2d 837 (La. 1974). The ability to read was mentioned in *Hoover*, but only in passing. It was not in serious dispute, and no mention of a standard of proof on the issue was made.

61. Both cases rely upon Succession of Brown, 251 So. 2d 465 (La. App. 1st Cir. 1971). It in turn relies upon Succession of Lambert, 185 La. 416, 169 So. 453 (1936), which in turn relies heavily on Succession of Mithoff, 168 La. 624, 122 So. 886 (1929), as to the strength of which one should consult *supra* text accompanying notes 47-55.

62. See Succession of Littleton, 391 So. 2d 944 (La. App. 2d Cir. 1980); Succession of Arnold, 375 So. 2d 157 (La. App. 2d Cir.), *cert. denied*, 376 So. 2d 1267 (La. 1979); Succession of Kite, 366 So. 2d 602 (La. App. 3d Cir. 1978), *cert. denied*, 369 So. 2d 155 (La. 1979); see also Succession of Kennedy, 423 So. 2d 76 (La. App. 1st Cir. 1982) (the appellate court noted that the trial judge had used the "beyond a reasonable doubt" standard in a case involving an attack on ability to read, and affirmed, but made no particular mention of whether it agreed with that standard); Succession of Glynn, 167 So. 2d 533 (La. App. 4th Cir.), *writ refused*, 246 La. 913, 168 So. 2d 823 (La. 1964) (burden of proving inability to read placed on opponents and not discharged, but no mention of standard of proof).

all of our people can read. Certainly the presumption that a person is able to read cannot be equal in strength to the presumption that a person is sane.⁶³ But such equalization is the net effect of the decisions treating an attack based on inability to read in the same fashion as an attack based on insanity. Fortunately, not all courts have so ruled, and there is some support for a "clear and convincing evidence" standard as to the inability to read.⁶⁴

What is worse, it may be strongly suspected that the courts are paying only lip service to the rigorous standard of "beyond a reasonable doubt." Too many successful attacks have been made on the ability to read for one to believe that opponents are actually held to such a standard.⁶⁵ If in practice a "clear and convincing evidence" standard on ability to read is being applied, the courts should simply say so and jettison the "beyond a reasonable doubt" shibboleth.

Perhaps article 2932 of the Louisiana Code of Civil Procedure should not be used to place the burden of proof as to testamentary capacity on the proponents when the testament is attacked within three months of probate. But even if that burden is to rest with the opponents at all times, at least the standard of proof which is imposed in cases involving an attack on the ability to read should be carefully examined to be certain that such standard has not gone beyond what is necessary to carry out the strong policy in favor of testation. Where the inability to read exists and cannot be established due to the difficulty of the standard of proving it, the only assurance of accuracy present in the statutory testament is

63. It is apt to observe that Civil Code articles 1470 and 1475 establish sanity as a requirement for all testaments and state a presumption that a person is sane until shown to be otherwise. But the Civil Code does not establish the ability to read as a requisite for all testaments. Indeed, the public and private nuncupative testaments were intended primarily for those who were unable to read and write. Thus, the ability to read is not *essentially* part of testamentary capacity; one can dispose of property by testament even if he cannot read. On the other hand, sanity is *essentially* part of testamentary capacity; one simply cannot dispose of property by testament if he is not sane. On this ground alone, there is sufficient justification to examine the standard of proof in the two instances carefully rather than simply lumping them together without analysis.

64. Succession of Vegas, 236 So. 2d 290 (La. App. 4th Cir. 1970) (attack on ability to read; court applied standard of "clear and convincing evidence" and found attack wanting).

65. Succession of Comeaux, 428 So. 2d 1081 (La. App. 1st Cir. 1983) (questionable whether proof eliminated any reasonable doubt that testator could not read); Succession of Kennedy, 423 So. 2d 76 (La. App. 1st Cir. 1982) (evidence not recited in great detail, but some question as to whether it eliminated any reasonable doubt); Succession of Kite, 366 So. 2d 602 (La. App. 3d Cir. 1978), *cert. denied*, 369 So. 2d 155 (La. 1979). One need only compare the frequency of such holdings with the paucity of decisions declaring that a testator lacked mental capacity (supposedly under the same standard) to observe the difference, though it is true that in some instances the difference might not be traceable to a different standard of proof.

lost,⁶⁶ and with it the strongest bulwark against fraud and deception.

Collation and Reduction

During this term, the second circuit had occasion to grapple with one of the most baffling parts of the Louisiana forced heirship scheme: the supposed inconsistency between the valuation rules for "fictitious" collation of movables and those for the "real" collation of movables. The decision in *Succession of Hendrick*⁶⁷ concerned the gifts of a very wealthy woman to her four children. Over a period of thirty years prior to her death, she made equal gifts to them totalling more than \$1,000,000. On one occasion in 1973, she proposed to make additional equal gifts of the sum of \$500,000.00. Three of the children directed that their portion of the gift be made to trusts for their own children; the fourth child accepted his portion.

After her death, the testatrix' olographic testament was probated. It bequeathed her residence to one daughter and declared that all of the inter vivos gifts to her children and the testamentary bequest of the residence were extra portions exempt from collation. The provisional administrator proposed to discharge the single testamentary bequest as written and to divide the remaining assets of the succession equally among the four heirs. Two of the four children opposed the tableau of distribution; the particular legatee and the child who had personally accepted the 1973 gift supported the proposed tableau and argued for the validity of the testament as written.

In round figures, the gross assets at death were \$710,000 (including the value of the residence at \$256,000). The debts amounted to \$56,500. Valuing the donations inter vivos according to their value at the time of decedent's death and adding them to the net estate at death yielded a figure for the active mass of \$2,466,000. Thus the legitime under the law at the time was \$1,644,000, and the disposable portion \$822,000.⁶⁸

66. Unlike some other types of testaments, the only assurance that the ordinary statutory testament accurately reflects the wishes of the testator is his ability to read the document and satisfy himself that it says what he wants it to say. There is no public reading of the document so that witnesses and others can compare the text with what they are hearing read. See LA. R.S. 9:2442 (Supp. 1983).

67. 430 So. 2d 734 (La. App. 2d Cir. 1983).

68. Both courts agreed on that calculation. The trial judge went on to conclude that since there were \$1,800,000 in inter vivos donations and the disposable portion was only \$882,000, "[i]t is clear that the inter vivos donations greatly exceed the amount of the disposable portion." *Succession of Hendrick*, No. 275,538, at 7 (1st La. Jud. Dist. Ct. Sept. 22, 1982). But where gifts to forced heirs are concerned, such a flat statement cannot justifiably be made. Another question must also be answered. To what extent have the inter vivos donations to forced heirs partially or wholly satisfied their legitime? To that

The various inter vivos donations had a collective value of some \$1,800,000 at the time of death. Some \$467,000 of that amount was immovable property, which presumably had appreciated in value from the dates of the various gifts until the time of death. The remainder was movable property (mostly stock), which collectively had a value of some \$350,000 at the dates of the various gifts, but a value of \$1,333,000 at death.⁶⁹ The figures resulting from a calculation of the active mass and the forced portion based on the date-of-death valuations will obviously be much greater than if the movables are calculated at the date-of-donation valuations. The trial judge felt compelled to make the "fictitious" calculation at the date-of-death figures,⁷⁰ but then determined the values received toward the legitime of each forced heir as of the date of donation for the movables given.⁷¹ The result was inevitable: although each forced heir held immovable and movable property which when added to his intestate share would be worth more than his calculated legitime,⁷² there had been an "impingement" of legitime due to the different valuations used.⁷³ Thus, under the provisions of Civil Code article 1510, the testamentary bequest could not be carried out.⁷⁴

The appellate court, though it used a curious reasoning process, was probably correct in reaching the contrary result and reversing the trial judge. Both the trial court and appellate court may have erred on a

extent, they are not chargeable to the disposable portion at all, but rather to the forced portion. Thus if it is determined that \$1,500,000 of the total \$1,800,000 in inter vivos gifts was a part of the legitime of the forced heirs, and simply given to them early, then the disposable portion has not been exceeded. Thus the appropriate inquiry is actually whether the yet-unsatisfied legitime (accounting for all the credits against it and gifts already made) can be satisfied from the net estate. If so, no issue of reduction is presented.

69. These figures are also gleaned from the trial judge's reasons for judgment. See Succession of Hendrick, No. 275,538, at 5-7 (1st La. Jud. Dist. Ct. Sept. 22, 1982).

70. Civil Code article 1505 directs that each donation inter vivos be "fictitiously added . . . according to its value at the time of the donor's decease, in the state in which it was at the period of the donation."

71. "When movables have been given, the donee is not permitted to collate them in kind; he is bound to collate for them by taking less, according to their appraised value at the time of the donation . . ." LA. CIV. CODE art. 1283.

72. The appellate court calculated that each forced heir had received lifetime gifts worth some \$327,000 at the date of death, and would receive another \$100,000 from the estate, totalling some \$427,000. This figure exceeded the forced share for each child of \$411,000. 430 So. 2d at 739.

73. But this result was reached without noting that the invalidation of the provision exempting these gifts from collation meant that these donations had all been made as *advances* on legitime rather than in an attempt to dispose of property from the disposable portion.

74. "When the value of donations *inter vivos* exceeds or equals the disposable *quantum*, all dispositions *mortis causa* are without effect." LA. CIV. CODE art. 1510. However, this article cannot be taken as literally as it is written. The article means that when lifetime gifts from the disposable portion exceed the disposable quantum, there is nothing left to give away upon death and testamentary bequests must be disregarded.

preliminary question which would have eliminated most of the discussion. In her olographic testament, the testatrix declared that her various lifetime and testamentary gifts were exempt from collation. That declaration would theoretically have eliminated Civil Code article 1283 from the case. But both courts interpreted Civil Code article 1233 to mean that she could only make such an exemption in an act passed before a notary and two witnesses. Such interpretation is probably too narrow a reading of this section of the Civil Code. Civil Code article 1229 provides that collation is founded on the "equality which must be naturally observed" among children and upon the "presumption" that what was given or bequeathed to children was "in advance of legitime," *i.e.*, was a part of their forced portion rather than a share of the disposable portion. Civil Code article 1231 follows that principle with a statement that such gifts shall not be collated if the donor has "formally expressed his will" that what he gave was not a part of the forced portion. And Civil Code article 1232 provides that such a declaration by the donor "*may* be made" not only in the instrument of gift, but "even afterwards by an act passed before a notary and two witnesses." Finally, article 1233 provides: "The declaration that the gift or legacy is intended as an advantage or extra portion, may be made in other equivalent terms, provided they indicate, in an unequivocal manner, that such was the will of the donor." Both courts chose to interpret this last article very literally, as concerning only the "terms" or words which the donor would choose to indicate exemption from collation rather than as authorizing her to choose another clear *form* of doing so, such as one of the accepted forms for testaments.

Certainly some earlier cases support the position of both courts, but *Succession of Hendrick* would have been an excellent opportunity to consider the meaning of these articles when read together. The corresponding article of the French Civil Code, article 919, provides simply that the exemption may be made in the form for dispositions inter vivos or in any of the testamentary forms. While the drafters of the Louisiana Civil Code did not enact that statement, they did provide specifically in article 1231 that a "formal declaration" by the donor would suffice; no similar statement exists in the French Civil Code. In light of that provision, article 1232 need not necessarily be read as a mandatory provision that any such formal declaration *must* be made in the manner there described. The article could simply be read in a permissive manner as indicating one certain way in which the formal declaration could take place. The primary interest is the donor's intent, not the formality.

Be that as it may, both courts chose to hold that the exemption from collation was invalid. Under the circumstances, that decision required both courts to reach the difficult valuation question. Both courts seemed to think that there was a conflict between the two parts of the Civil Code. The appellate court resolved the conflict by opining that the issue was one of reduction and that the "reduction" articles of the Civil Code should

prevail. It thus concluded that, using only Civil Code article 1505 and the values at death, there was no impingement of legitime, and the testamentary bequest was valid.

While this rationale achieved a proper result, it is not necessarily logical. If gifts *are* subject to collation, then they are by definition an advance on legitime. As a part of legitime, they must be accounted for in the process of collation as well as in the process of reduction.⁷⁵ Reduction applies to gifts to forced heirs and to strangers; collation only applies to gifts to forced heirs. Part of the difficulty is that a gift to a forced heir is ambiguous. It might be a part of his forced portion, but it might be out of the disposable portion, as if made to a stranger. In *Hendrick*, the testatrix attempted to remove the ambiguity, but that directive in her testament was held invalid to accomplish that purpose.

The redactors of the Civil Code probably envisioned movables as assets which always depreciated in value and immovables as assets which always appreciated in value. Moreover, they were certainly much more concerned with immovables than movables in the context of protecting the rights of forced heirs.⁷⁶ Since an immovable would be almost certain to appreciate in value, collation either in kind or by taking less would equally protect those rights.⁷⁷ But if a movable depreciated in value, return in its depreciated state would not adequately protect the forced heirs. Thus the Civil Code provides that movables may not be collated in kind, but only by taking less and only according to the value at the time of the gift.⁷⁸ Thus in the case of a depreciating movable whose value is used up by the donee, to have him account according to the value at the time of the donation would be fair to both him and the forced heirs. At the same time, the valuation of such a movable under Civil Code article 1505 should be its value at the time of the *gift*. The writer submits that this is the purpose of the phrase "in the state in which it was at the period of the donation" which closes subsection (A). If this phrase adds nothing to

75. This result is accomplished by crediting against the respective legitime shares any gift which the forced heir has received and which is subject to collation, because that is a part of his legitime. See *Succession of Gomez*, 223 La. 859, 67 So. 2d 156 (1953); *Succession of Gomez*, 226 La. 1092, 78 So. 2d 411 (1955). Life insurance proceeds received and proceeds of various qualified compensation plans must also be credited. See LA. CIV. CODE art. 1505(C), (D). Thus "collation" is being done during the process of "reduction."

76. This would account for the fact that the Civil Code made provisions for the mortgage of immovables, and their use in accumulating wealth and conducting business affairs, but made no provision for the mortgage of a movable. Also, the redactors were concerned about sale of an immovable for less than half its value and offered a remedy to the aggrieved seller, but made no similar provision for the sale of a movable.

77. LA. CIV. CODE art. 1251.

78. LA. CIV. CODE art. 1283.

the meaning of "according to its value at the time of the donor's decease," it should have been omitted. The phrase must mean something.⁷⁹

An appreciating movable skews this scheme. As the author of the opinion in *Hendrick* so accurately observed, an absurd result could be achieved by using the appreciated value at death but only the lesser value at the time of the donation.⁸⁰ The only way to make the scheme work properly is to treat all appreciating assets (whether movable or immovable) the same, and "allow" collation at the value at the time of death. All depreciating assets should likewise be treated the same, and should be "collated" only by taking less—and then according to their value at the date of donation.

The purists will argue that this process takes great liberty with the Civil Code as written. Perhaps their argument is correct, but the Civil Code should be interpreted as a whole so that it makes sense rather than producing absurd results.⁸¹ The appellate court in *Hendrick* achieved the suggested result by calling the issue one of "reduction" and using values at death. The proposal made here is to call the issue one of "collation" (which it is), but to still use values at death because the assets in question appreciated in value. However, legislative clarification of these sections of the Civil Code may well be the only certain solution.

Seizin

The opinion during this term in *Mingledorff v. American Bank & Trust Co.*⁸² is a continuation of a refreshing line of recent cases revealing a greater understanding of the long-confused concept of seizin as contained in the Civil Code. The decision involved the ranking of various mortgages and privileges held against the debtor. Among the funds

79. Thus when a donated asset has depreciated in value, its value at the date of donation would serve as both the value included in the calculation under article 1505 and the value for "taking less" if collation were required. There would be no discrepancy in the "fictitious" and "real" calculation. If a donated asset increased in value, the value at the date of death would serve for both purposes. Since none of the donated assets in the *Hendrick* case appeared to have decreased in value, this aspect of the problem was not considered.

80. If a parent gave \$5,000 worth of stock to each of his three children, and that stock appreciated in value to \$50,000 by the time of death, the total of his donations inter vivos would be \$150,000 under article 1505. If he had net assets of \$100,000 at death, then the active mass would be \$250,000. Under the law as it stood at the time of Mrs. Hendrick's death, the forced share would be \$166,667 and the disposable portion \$83,333. But if the value received by the forced heirs were calculated at the time of donation, they would have received a total of \$115,000 (\$15,000 from the donations and \$100,000 from the net estate at death) against a supposed legitime of \$166,667. But the estate would be exhausted, and there would be no disposable portion whatsoever. See 430 So. 2d at 740.

81. See LA. CIV. CODE arts. 13, 14, 16, 17.

82. 420 So. 2d 463 (La. App. 2d Cir.), cert. denied, 423 So. 2d 1161 (La. 1982).

available to satisfy the debts were monies derived by the debtor through succession to the property of his deceased parents. Determination of the point at which the debtor became "owner" of the property in question was fundamental to the ranking process. The issue was whether he was owner as of the moment of the death of his respective parents, or only from the time of the judgment of possession. The second circuit properly held that he was owner as of the moment of the death of the ancestor, but to do so, the court had to divide the concept of seizin into its component parts of (1) ownership and (2) procedural capacity. Having seizin as the repository of procedural capacity was made necessary by the abolition in 1825 of the concept of the succession as a separate juridical person. If "the succession" did not have the capacity to sue and be sued after 1825, then those having "seizin" must have that capacity.

The Louisiana concept of seizin contains these two important features, but they are so intertwined that neither has ever been completely understood. Properly understood, Civil Code articles 940 and 941 express the concept of immediate ownership through succession to the universality of the patrimony. With the exception of a curious concluding phrase in one article, these articles have nothing to do with the aspect of seizin as investing certain persons with procedural capacity.⁸³ Civil Code articles 942 and 943 elaborate upon the concept of immediate ownership by discussing the continuation of possession without interruption.⁸⁴ Civil Code article 944 continues these provisions by authorizing an heir who has such ownership to transmit his own rights to his heirs, even if the formal succession process is not complete at his death.⁸⁵

83. "A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds. This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees." LA. CIV. CODE art. 940. This final statement is clearly erroneous as it applies to the concept of ownership, since Civil Code article 1626 provides the contrary as to particular legatees, and *Tulane Univ. v. Board of Assessors*, 115 La. 1025, 40 So. 445 (1905) (particular legatees were owners of their legacies at moment of death, though not "seized" of them) so holds. The statement must therefore be referring only to procedural capacity, demonstrating the intertwining of the two concepts under the heading of seizin in the same article.

"The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it." LA. CIV. CODE art. 941.

84. "The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession." LA. CIV. CODE art. 942.

The right of possession, which the deceased had, being continued in the person of his heir, it results that this possession is transmitted to the heir with all its defects, as well as all its advantages, the change in the proprietor producing no alteration in the nature of the possession.

LA. CIV. CODE art. 943.

Civil Code article 945 is the first place in which the procedural capacity aspect of seizin is discussed: "The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced." Civil Code articles 946, 947 and 948, in their turn, appear to return to the concept of immediate ownership rather than procedural capacity.⁸⁶ But throughout these articles, no clear distinction is made between these two related but nonetheless entirely separate concepts. They are of equal importance, but they are not identical.

The appellate court in *Mingledorff* followed the lead of *Baten v. Taylor*⁸⁷ in distinguishing "seizin" (*i.e.*, the procedural capacity aspect of seizin) from "ownership." A person "seized" of property (*i.e.*, with procedural capacity to represent the deceased owner's rights or obligations with respect to it) might not necessarily be the owner.⁸⁸ And the owner might not necessarily be "seized." In the *Mingledorff* case, ownership rather than procedural capacity was at issue. The heir was owner from the moment of the ancestor's death, and thus the judicial mortgage of the creditor attached from that point and should be ranked accordingly.

Miscellany

The decision in *Hopson v. Ratliff*⁸⁹ involved the interpretation of the phrase "to be equally divided among them" in a legacy of the residuum. The testatrix had left a particular legacy to her sister, and then listed her sister and three nieces as the legatees of the residuum with the qualifying phrase noted above. The sister predeceased the testatrix. The court took note of *Succession of Lambert*,⁹⁰ which overruled a number of years of jurisprudence by holding that the phrase "share and share alike" destroyed conjointness in a legacy, with the result that the share of a

85. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

LA. CIV. CODE art. 944.

86. These articles speak of the "right" being in suspense until the heir decides whether to accept or reject it, with the acceptance being "retroactive" to the time of death.

87. 386 So. 2d 333 (La. 1979). In that case, the court clearly distinguished between "seizin" (in its sense as repository of procedural capacity) and ownership in upholding the validity of a thirty-day survivorship clause in a testament.

88. Of course, once a succession representative is appointed, the procedural capacity of the heirs or legatees who might be seized is superseded by the capacity of that representative. See LA. CODE CIV. P. art. 3211.

89. 426 So. 2d 1377 (La. App. 3d Cir. 1983).

90. 210 La. 636, 28 So. 2d 1 (1946).

predeceased legatee did not accrete to the other or others named in that same legacy. In the present instance, the court held that the phrase "to be equally divided among them" destroyed the conjointness of the legacy of the residuum and thus its universality. Since the nieces were therefore not universal legatees, they did not take the lapsed legacy of the predeceased sister, neither the particular legacy itself nor her share of the residuary legacy. They were also not "bound to discharge" the legacies under Civil Code article 1704, and were not entitled to her share on that ground. Thus the predeceased sister's legacy fell intestate, to be shared by all the intestate successors.

In *Jordan v. Cosey*,⁹¹ the Louisiana Supreme Court reached the predictable conclusion that Civil Code article 1486, which limited the amount an illegitimate child could receive by donation from his father if the father left legitimate relations, was unconstitutional even prior to its repeal in 1979. The death in question had occurred in 1978 (after the decision in *Trimble v. Gordon*⁹² and after the passage of the new state constitution in 1974), and the court rejected the argument of a legitimate sister that she could use Civil Code article 1486 to limit the disposition made by her brother to his four acknowledged illegitimate children.

In *Succession of Wagner*,⁹³ the fourth circuit upheld the validity of a disposition which required the forced heirs to take certain actions or risk the loss of the entire disposable portion. The testator's wife had predeceased him, and thus his testament could only deal with one half of the former community. He bequeathed a certain piece of land to a legatee, apparently with the knowledge that he owned only a half interest in the land. In order to induce his children to cede their half interest in the land to carry out the totality of that bequest, he wrote: "In the event that any of my children should object to the above . . . disposition of that particular lot to Marie Amick, then I will . . . to the said Marie Amick the disposable portion of my entire estate."⁹⁴ The court held that the forced heirs could not be forced to cede their interest but also held that the disposable portion would properly belong to the legatee if the forced heirs chose not to cede that interest. The decision was unlike earlier ones in which the forced heirs were made to accept certain conditions on the legitime being received from the testator at the risk of losing the disposable portion. Here, there was no evidence of impingement on legitime by the value of the father's half interest so given, and the heirs were being asked to give up something they already owned—their mother's half interest.

91. 434 So. 2d 386 (La. 1983).

92. 430 U.S. 762 (1977).

93. 431 So. 2d 10 (La. App. 4th Cir. 1983).

94. *Id.* at 11.

In *West v. Gajdzik*,⁹⁵ the third circuit applied the doctrine of *contra non valentem* to suspend the running of the ordinary prescriptive period of five years on an action to reduce an excessive donation under Civil Code article 3542 upon a showing that the defendant had engaged in "concealment and ill practices." These concealment practices made it impossible for the claimant to file her action until almost ten years had passed since the death of her father. Her suit filed within one year of the discovery of the fraudulent practices was held to be timely.

And finally, in *Succession of Boyenga*,⁹⁶ the supreme court held that the attorney named in the probated testament to represent the executrix, but who did not perform any services in that connection because the executrix sought successfully to have him removed, was not entitled to any fee which he did not earn.⁹⁷

95. 425 So. 2d 263 (La. App. 3d Cir. 1982), *cert. denied sub nom.* *West v. Savoie*, 428 So. 2d 475 (La. 1983).

96. 437 So. 2d 260 (La. 1983).

97. See Mengis, *Developments in the Law, 1982-1983—Professional Responsibility*, 44 LA. L. REV. 489 (1983).

